1IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.09-2006

CORAM :

THE HONOURABLE MR. JUSTICE A.KULASEKARAN

W.P. Nos. 30240 of 2003, 22354 and 36065 of 2005

WP No. 30240 of 2003

S.K. Chaudhary .. Petitioner

Versus

1. Union of India
   rep. by Secretary to Government
   of India
   Ministry of Defence
   South Block
   New Delhi - 110 001

2. The Director General
   Coast Guard
   Coast Guard Head Quarters
   National Stadium Complex
   New Delhi - 110 001

3. Mr.K.C.Pande
   DIG, Coast Guard Head Quarters
   National Stadium Complex
   New Delhi - 110 001

4. Mr. M.A. Thalha
   DIG, Coast Guard District
   Headquarters - 3
   New Mangalore Port
   New Mangalore

5. Mr. K.R. Nautiyal
   DIG
   Officer-in-charge
   Bureau of Naviks
   Cheetah Camp
   Mankhud, Mumbai

6. Mr. S.C. Tyagi
   DIG
   Office of Commander-in-Chief
   Andaman & Nocobar
   Port Blair

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7. Mr. S.D. Sonak
   Commandant
   Coast Guard H.Qrs (West)
   Golfa Devi Road
   Prabhadevi P.O.
   Mumbai .. Respondents

WP No. 22354 of 2005

Commandant S.K. Chaudhary
Commanding Officer
Coast Guard Station-Mandapam
Mandapam, Rameswaram .. Petitioner

Versus

1. The Director General of
   Coast Guard
   Coast Headquarters
   National Stadium Complex
   New Delhi 110 009

2. The Commander
   South Guard Region (East)
   Near Napier Road
   Coovam River Mouth
   Chennai - 600 009

3. Vice Admiral A.K. Singh
   Director General of Coast
   Guard
   National Stadium Complex
   New Delhi - 110 009 .. Respondents

WP No.36065 of 2005

S.K. Chaudhary .. Petitioner

Versus

1. Union of India
   rep. by Secretary to Government
   of India
   Ministry of Defence
   South Block
   New Delhi - 110 001

2. The Director General
   Coast Guard
   Coast Guard Head Quarters
   National Stadium Complex
   New Delhi - 110 009

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3. The Commander
   Coast Guard Region (East)
   Near Nappiar Bridge
   Koovam River Mouth
   Chennai - 600 009

4. VSR. Murthy (0092-J)
   DIG, Coast Guard Headquarters
   National Stadium Complex
   New Delhi - 110 009

5. K. Natarajan (0091-E)
   DIG, CGS Vivek
   C/o. Fleet Mail Office
   Kochi

6. KPS. Raghuvanshi (0095-P)
   DIG, Coast Guard Headquarters
   National Stadium Complex
   New Delhi - 110 009

7. G. Singh (0083-M)
   DIG, Coast Guard District
    Headquarters-8
   Haldia
   West Bengal

8. K.S. Sheoran (0089-C)
   DIG, CGS VAJRA
   C/o.Fleet Mail Office
   Vishakapatnam
   Andhra Pradesh .. Respondents

WP No. 30240 of 2003: Petition under Article 226 of The Constitution of India praying for a Writ of Certiorarified Mandamus to call for the records relating to the Promotion List issued by the second respondent for the post of Deputy Inspector General, Coast Guard, dated 18.08.2003 in reference No.AIG 2061 and quash the same and direct the respondents to promote the petitioner as Dy. Inspector General with effect from 29.06.2001 with all consequential benefits.

WP No. 22354 of 2005: Petition under Article 226 of The Constitution of India praying for a Writ of Certiorari to call for the records relating to the show cause notice dated 08.06.2005 in LW/0551/15 of the first respondent, communicated to the petitioner by the second respondent by letter dated 13.06.2005 and quash the same.

WP No. 36065 of 2005: Petition under Article 226 of The Constitution of India praying for a Writ of Certiorarified Mandamus to call for the records relating to the proceedings of the 2nd respondent dated 30.10.2005 R 301401 125 C.G. Promoting respondents

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4 to 8 as D.I.G. (GD) and quash the same and direct the respondent 1 and 2 to promote the petitioner as D.I.G. Coast Guard with effect from 29.06.2001.

For Petitioner : Mr. G. Rajagopal, Senior Counsel for M/s. G.R. Associates in all the writ petitions

For Respondents : Mr. V.T. Gopalan
Additional Solicitor General
assisted by Mr.P. Wilson
Special Government Pleader
for RR1 and 2 in WP 30240/03
for RR1 to 3 in WP 36065/05
for all respondents in
WP 22354 of 2005

COMMON ORDER

By consent of counsel for both sides, the writ petitions are taken up together for hearing, common arguments were advanced by counsel on both sides, hence, the writ petitions are disposed of by this common order.

2. The petitioner joined Indian Coast Guard as Assistant Commandant in December 1982, later, he was promoted as Commandant – Selection Grade on 29.06.2003. He worked as Commandant at Coast Guard District Head Quarters-5, Stationed at Madras, when filing the writ petitions, he was transferred as Commandant Officer, Mandapam. The Coast Guard (Seniority and Promotion Rules) 1989 provides for promotion to the post of Deputy Inspector General from the rank of Commandant, who should have completed 8 years of service in the rank of Commandant and two years of sea-time. The petitioner is said to have qualified for next promotion as Deputy Inspector General, which was due on 29.06.2001. The petitioner gave a representation on 10.03.2003 to the respondents/department to consider him for promotion to the post of Deputy Inspector General, which is due for a long period. The Coast Guard Head Quarters sent a communication dated 09.06.2003 stating that his representation was considered and he is eligible for consideration for promotion to the post of Deputy Inspector General and he would be considered for promotion as and when the Board is convened. On 08.08.2003, the Departmental Promotion Committee (DPC) was convened by the second respondent for the year 2003 for 12 vacancies of Deputy Inspector General. Though the petitioner and others were considered, he was not selected but his batch mates namely K.C. Pande, M.A. Thalha, K.R. Nautiyal and S.R. Thyagi, who are respondents 3 to 6 in WP No. 30240 of 2003 were selected and only 4 vacancies were filled up out of the 12 vacancies. Aggrieved by the said act of non-selection, the Petitioner has filed W.P. No. 30240 of 2003 to call for the records relating to the promotion list issued by the respondents/department for the post of Deputy Inspector General for Coast Guard dated 18.08.2003 and quash the same and direct the respondents/department to promote him as Deputy Inspector General with effect from 29.06.2001 with all consequential benefits. When the said writ

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petition is pending, the respondents/department have sent a communication dated 13.11.2003 threatening departmental action since the petitioner has filed writ petition before this Court, which was also brought to the notice of this Court and this Court directed the respondents/department to tender an unconditional apology, which was complied with by them. At that time, the respondents/department proposed to convene DPC and the petitioner filed WPMP No. 31809 of 2004 to consider his name and the respondents/department submitted that the name of the petitioner would be considered by them and the said petition was ordered accordingly. The petitioner was surprisingly issued a show cause notice by the second respondent stating that when the petitioner was sitting along with other members to hear a case, though ample documentary evidence were brought on records to establish the charges relating to the said accused, the same were not considered properly, which amounts to failing in the duty and called for an explanation from him. The said notice is challenged in WP No. 22354 of 2005 on the ground that the same was issued only to defeat his promotional aspect. The petitioner later came to know that the second respondent conveyed a department promotion committee on 30.10.2005 and promoted his juniors, challenging the same, he has filed WP No. 36065 of 2005 wherein the said persons were cited as respondents 4 to 8.

3. The learned Senior counsel Mr. G. Rajagopal appearing for the petitioner submitted as follows:-

The petitioner came to know when ranking on merit was made his name was placed in the second or third position in the list of the persons to be promoted as DIG in the year 2003, but his name was not included in the select list when published. There were 12 vacancies of DIG post, but the respondents/department filled up only 4 vacancies. Non-filling of rest of the vacancies is against the Rules. Non-consideration of the petitioner for promotion is violative of Fundamental Rights. The Rule, which prevailed in the year 2003 was that the promotion of officer to the rank of Commandant and above shall be made on the basis of merit with due regard to seniority. When apply merit with seniority as prescribed in the then Rule, the assessment of comparative merit of all eligible candidates and selecting the best out of them has to be made. The selection based on merit with due regard to seniority means merit in all respects shall be the governing consideration and the seniority shall play only a secondary role. It is only when merit and suitability are roughly equal, the seniority will be the determining factor. Though the petitioner secured more marks than the sixth respondent in WP No. 30240 of 2003, non-inclusion of his name is illegal, which is evident that in Appendix B of nominal roll of commandants for consideration for promotion to the rank of DIG by CGSPB NO.2 - 18TH AUGUST 2003 (FOR THE YEAR 2002) it is mentioned thus:-

S.No.	Name	Average	Fit/Unfit
4.	K.C. Pande	14.20	fit
5.	M.A. Thalha	13.92	fit
6.	R.R. Nautiyal	13.84	fit
7.	S.C. Tyagi	13.74	fit
8.	S. Sonak	13.38	unfit

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9.	S.K. Chaudhary	13.76	fit
10.	K.N. Krishnamoorthy	14.42	fit

The bench marks 13.50 to 14.99 is very good.

By pointing out the said Appendix, the learned Senior counsel submitted that K.N. Krishnamoorthy has secured 14.42 and the petitioner herein has secured 13.76, both were found fit, but the respondents/ department arbitrarily selected the person at Sl.No.7 Tyagi (R6 in WP No. 30240 of 2003), who has secured only 13.74, hence, the selection is contrary to the said Rules, besides, only four vacancies were filled up out of 12. The details of the said benchmarks were deliberately not mentioned in the counter, but the same was ascertained only when the records were summoned by this Court. It is also wrongly mentioned in the counter that non-inclusion of the petitioner was that he was in low medical category. Even in case of low medical category, the respondents/department should have forwarded it to Director General, who is the competent authority, but the respondents/department failed to do so in the petitioner's case. In support of this contention, the learned Senior counsel relied on the below mentioned decisions:-

i) (Union of India and others vs. Lt. General Rajendra Singh Kadyan and others) AIR 2000 Supreme Court 2513 wherein in Para Nos. 11 and 12, it was held thus:-

> 11. ...Selection implies the right of rejection depending upon the criteria prescribed. Selection for promotion is based on different criteria depending upon the nature of the post and requirements of the service. Such criteria fall into three categories, namely,
>
> 1. seniority-cum-fitness,
>
> 2. seniority-cum-merit,
>
> 3. merit-cum-suitability with due regard to seniority.
>
> 12. Wherever fitness is stipulated as the basis of selection, it is regarded as a non-selection post to be filled on the basis of seniority subject to rejection of the unfit. Fitness means fitness in all respects. "Seniority-cum-merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed. Subject to fulfilling this requirement the promotion is based on seniority. There is no requirement of assessment of comparative merit both in the case of seniority-cum-fitness and seniority-cum-merit. Merit-cum-suitability with due regard to seniority as prescribed in the case of promotion to All-India Services necessarily involves assessment of comparative merit of all eligible candidates, and selecting the best out of them."

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ii) (Harigovind Yadav Vs. Rewa Sidhi Gramin Bank and others) 2006 AIR SCW 2822 wherein in Para Nos. 13, 20 and 21, it was held thus:-

> "13. This Court also noted that while the principle 'merit-cum-seniority' laid greater emphasis on merit and ability and seniority plays a less significant role, becoming relevant only when merit is approximately equal....
>
> 20. The learned counsel for the Bank placed reliance on the decision of this Court in K. Samantaray v. National Insurance Co Ltd., (2004) 9 SCC 286) where this Court, following the earlier decision in Syndicate Bank SC & ST Employees Assn. v. Union of India (1990 Supp SCC 350) reiterated that apart from the recognised methods of seniority-cum-merit and merit-cum-seniority, there can also be a third method, that is a hybrid mode of promotion. This Court observed:
>
> 'While laying down the promotion policy or rule, it is always open to the employer to specify the area and parameter of weightage to be given in respect of merit and seniority separately so long as policy is not colourable exercise of power, nor has the effect of violating any statutory scope of interference and other relatable matters.'
>
> But in that case promotions were not governed by any statutory Rules, but by a promotion policy. The above observations made with reference to such a policy, which wholly occupied the field insofar as promotion is concerned, are not relevant where the Statutory Rules require promotion by seniority-cum-merit.
>
> 21. ....Having regard to the factual background of the case, and having regard to the fact that even under the merit-cum-seniority basis adopted by the bank the appellant had secured high marks and he was denied promotion on the ground that he failed to secure high marks in the interview, there is no need to refer the matter for fresh consideration. With a view to do complete justice, in exercise of our power under Article 142, we hereby direct the first respondent bank to promote the appellant as a Field Supervisor, from the date the third defendant was promoted as Field Supervisor and place him above the third respondent. However, he will be entitled to monetary benefits flowing from such promotion

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only prospectively, though the pay is to be re-fixed with reference to the retrospective date of promotion."

iii) (Sarat Kumar Dash and others vs. Biswajit Patnaik and others) 1995 Supp (1) Supreme Court Cases 434 wherein in Para Nos. 8, it was held thus:-

"8. In case of merit-cum-suitability, the seniority should have no role to play when the candidates were found to be meritorious and suitable for higher posts. Even a juniormost man may steal a march over his seniors and jump the queue for accelerated promotion. This principle inculcates dedicated service, and accelerates ability and encourages merit to improve excellence. The seniority would have its due place only where the merit and ability are approximately equal or where it is not possible to assess inter se merit and the suitability of two equally eligible competing candidates who come very close in the order of merit and ability. Under those circumstances, the seniority will play its due role and calls it in aid for consideration. But in case where the relative merit and suitability or ability have been considered and evaluated, and found to be superior, then the seniority has no role to play. In our view the PSC has evolved correct procedure in grading the officers and the marks have been awarded according to the grading. It is seen that the four officers have come in the grading of 'B'. In consequence, the PSC had adopted the seniority of the appellants and Panda in the lower cadre in recommending their cases for appointment in the order of merit.

The learned Senior counsel for the petitioner submitted that the respondents 4 to 8 in WP No. 36065 of 2005 are juniors to the petitioner and the respondents/ department have promoted them ignoring the merits of the petitioner. Non-promotion of the petitioner as Deputy Inspector General is clearly mala fide which is apparent from the contents of WP No. 30240 of 2003 and WP No. 22354 of 2005. The petitioner maintained unblemished record of service but promotion was denied to him from 2001 onwards. In 2003, petitioner's name was not included in the selection list on the ground that he was not senior. In 2005, his name was not included because of the reason that he has not satisfied the merit, thus the respondents, on two occasions denied promotions on the sole ground that the petitioner has approached this Court by filing WP No. 30240 of 2003. When WP No. 30240 of 2003 was pending, the respondents/department have sent a communication dated 13.11.2003 threatening departmental action against him, which was also brought to the notice of this Court and this Court directed the respondents/ department to tender unconditional apology. Of course, the said order was complied by the respondents. In order to victimise the petitioner for the said reasons, the respondents/department have issued a show cause notice on the ground that the petitioner, while

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sitting along with other members to hear a case has allegedly not considered the evidence properly and acquitted the accused. The said act of the respondents/department amounts to mala fide. The petitioner has filed WP No. 22354 of 2005 wherein he has submitted valid reasons justifying the mala fide act of the respondents/department. It is further submitted by Mr. Rajagopal that it is not necessary for the party alleging mala fide to name the officer in the petition and prove by positive evidence that a particular officer was responsible for misusing the authority by taking action for collateral purpose. In support of this contention, the learned Senior counsel relied on the decision reported in (The State of Punjab vs. Ramji Lal and others) AIR 1971 Supreme Court 1228, wherein in Para No.9, it was held thus:-

> 9. Counsel for the State of Punjab contended that the plea that the action of State was not bona fide cannot be said to be established unless the party alleging that case names the officer or officers guilty of conduct which justifies an inference that the official act was done for a collateral purpose, and since no such attempt was made and the High Court did not find that any named officer or officers was or were responsible for that official act the plea that it was bona fide must fail. We do not think that the law casts any such burden upon the party challenging the validity of the action taken by the State Government. The State Government has undoubtedly to act through its officers. What matters were considered, what matters were placed before the final authority, and who acted on behalf of the State Government in issuing the order in the name of the Governor, are all within the knowledge of the State Government, and it would be placing an intolerable burden in proof of a just claim to require a party alleging mala fides of State action to aver in his petition and to prove by positive evidence that a particular officer was responsible for misusing the authority of the State by taking action for a collateral purpose.

The learned Senior counsel for the petitioner submitted that the respondents/department have issued a show cause notice 08.06.2005, which is challenged in WP No. 22354 of 2005. Though it is a show cause notice, when the authorities have no jurisdiction to issue the same, the petitioner is entitled to seek remedy under Article 226 of the Constitution of India for enforcement of his fundamental rights. To substantiate this contention, the learned Senior counsel relied on the decision reported in (Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others) AIR 1999 Supreme Court 22, wherein in Para No. 15, 20 and 21, it was held thus:-

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"15. ....But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

21. That being so, the High Court was not justified in dismissing the writ petition at the initial stage without examining the contention that the show-cause notice issued to the appellant was wholly without jurisdiction and that the Registrar, in the circumstances of the case, was not justified in acting as the "TRIBUNAL"."

4. Mr. V.T. Gopalan, learned Additional Solicitor General appearing for the respondents 1 and 2 in WP No. 30240 of 2003, respondents 1 to 3 in WP No. 36065 of 2005 and all the respondents in WP No. 22354 of 2005 submitted that as per Rule 7 (3) of the Coast Guards (Seniority and Promotion) Rules 1986, promotion to the rank of Commandant and above shall be made on the basis of merit with due regard to seniority. As per DOP&T instructions, on conducting of promotion boards, for promotion to the selective rank, zone of consideration has been fixed as 5 for 1 vacancy; 8 for 2 vacancies; 10 for 3 vacancies and twice a number of vacancy plus four in the event vacancies are more than 3. Keeping in view the pay scale of the selective ranks, benchmarks for promotion has also been prescribed. The benchmark for selective promotion to the rank of Deputy Inspector General in the pay scale of 16400-450-20000 is 'very good' based on last five years confidential reports. The Coast Guards service is following numerical grading system. The Government has fixed sum of promotion potential and promotion quotient equivalent to 13.50 to 14.99 as very good. Further, keeping in view the benchmark assessment as above, the eligible officer in the zone of consideration are considered fit or unfit for further promotion. The select list is thereafter drawn from amongst those

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considered fit for promotion in the order of their inter-se seniority. Merely the petitioner become eligible for consideration for promotion does not confer any right to him as the promotion to the rank of Deputy Inspector General is made on selection basis. The petitioner has wrongly submitted that there are 13 or 12 vacancies in the rank of DIG. The Officers to be promoted must be medical category S1A1, S2A1 or S2A2 on the date of promotion. Officers who are placed in low medical category temporarily or permanently are not automatically promoted to the rank of Deputy Inspector General even if they meet the criteria for selective promotion to this rank. Such cases are to be submitted to the Director General accompanied with medical board proceedings for decision on merits of each case. The petitioner being in low medical category S3A2 on the relevant date, he is not entitled for promotion to the rank of Deputy Inspector General in the normal course. The petitioner at serial No.9 of the nominal roll of commandant (GD) was duly considered as he was found eligible and within the laid down zone of consideration. 4 commandants (GD) who are senior to the petitioner were found fit for promotion and in the promotable medical category were recommended by the promotion board. AS the promotions were made against vacancies of the year 2002, four commandants, who are respondents 3 to 6 in WP No. 30240 of 2003 were promoted on 18.08.2003 itself. The representation made by the petitioner as against the said promotion in the year 2003 was also duly considered by the respondents/department and rejected. The eligible officers in the zone of consideration for promotion to the rank of Deputy Inspector General were assessed by the Board as indicated in Appendix A and B with reference to last five years confidential report in accordance with DOT&P instructions on the subject. The Board, after perusing the confidential reports rendered on the officers and the relevant documents recommends empanelment of the respondents 3 to 6 in WP No. 30240 of 2003. Appendix A consists of 18 persons whose rank, seniority and medical category were found mentioned. Appendix B consists of 12 persons whose last five years Annual Confidential Reports average is mentioned as follows:-

S.No.	Name	Average	Fit/Unfit
4.	K.C. Pande	14.20	fit
5.	M.A. Thalha	13.92	fit
6.	K.R. Nautiyal	13.84	fit
7.	S.C. Tyagi	13.74	fit
8.	S. Sonak	13.38	unfit
9.	S.K. Chaudhary	13.76	fit
10.	K.N. Krishnamoorthy	14.42	fit

The bench marks 13.50 to 14.99 is very good.

Thus, the promotions were given to the respondents 3 to 6 in WP No. 30240 of 200 by strictly following the Rules and prayed for dismissal of the said Writ Petition.

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As per the revised conditions of service notified vide SRO 133 dated 17.09.2004, the commandants with the following QRs are eligible for consideration for promotion to the rank of Deputy

Inspector General based on comparative merit from amongst the officers in the zone of consideration.

Consequent to the revision of condition of service, the Government has accorded approval for selection procedure as indicated below:-

(i) last five years confidential report in the rank failing which all rank report be considered

(ii) All vacancies in the rank accruing from first of April to 31st of March of next year shall be made by the respective promotion board to be convened in the first quarter of each year.

(iii) Selection by suitable promotion board based on comparative merit of assessment as recorded in the relevant CRs. All eligible officers in the zone of consideration be placed in descending order as per the average numerical assessment of relevant potential reports and to draw a select list rank branch wise depending upon the number of vacancies available in a particular year

(iv) every eligible officers shall be subject to 3 'looks' by respective promotion board. After first look, those not selected shall be assigned R1 status. After second look, they will be assigned R2 status. The promotion board shall consider only fresh look R1 and R2 officers each year

(v) Each promotion board is considered to fill batch every year ensuring that a minimum of 2 eligible officers are available for each vacancies in the rank of commandants and 3 candidates against every vacancies in the rank of Deputy Inspector General and Inspector General.

(vi) For promotion of higher rank, eligibility shall be as per the revised conditions of service/residentiary period.

The records produced disclose that the order of Merit of Commandants of GD Branch as follows:-

"ORDER OF MERIT
COMMANDANTS OF GD BRANCH WITH RANK SENIORITY UPTO APR 1995

S.No	Name	P.No.	2005 -06	2004 -05	2003 -04	2002 -03	2001 -02	AVG
1.	KPS Raghuvanshi	0095-P	15.30	15.00	14.50	14.60	13.90	14.66
2.	K Natarajan	0091-E	14.40	14.40	14.40	14.80	14.50	14.50
3.	VSR Murthy	0092-J	14.60	14.80	14.60	14.40	13.90	14.46
4.	G Singh	0083-M	14.60	14.60	14.50	14.40	1.80	14.38
5.	KS Sheoran	0089-L	14.40	14.20	14.00	14.20	14.00	14.16
6.	VK Sharma	0042-S	14.20	14.20	14.00	13.60	13.80	13.96
7.	PK Luthra	0010-V	14.00	14.20	14.10	14.00	13.30	13.92
8.	RK Wadhwa	0041-Q	14.40	14.20	13.70	12.90	13.90	13.82
9.	AS Rathore	0088-X	14.20	14.10	14.00	13.60	13.10	13.80
10.	A Athinarayan	0093-L	13.90	14.00	13.50	14.00	13.60	13.80
11.	S Srikumar	0043-V	14.40	13.80	13.20	13.80	13.70	13.78
12.	SK Singh	0069-E	14.20	14.00	13.30	12.70	13.10	13.46
13.	S Sonak	0061-M	13.60	13.60	13.20	13.00	13.60	13.40
14.	BP Singh	0073-P	13.40	12.60	13.00	13.60	14.00	13.32
15.	SK Chaudhary	0063-Q	14.00	13.00	10.80	12.70	13.10	12.72
16.	LS Asai	0024-D	13.30	12.60	12.00	11.30	11.50	12.14"

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It is further stated by the learned Additional Solicitor General that it is clear from the above that promotions have been made on relative merit based selection and the question of

respondents 4 to 8 in WP No. 36065 of 2005 being juniors to the petitioner is irrelevant and immaterial and prayed for dismissal of WP No. 36065 of 2005.

It is further stated by the learned Additional Solicitor General that an employee has a right to be considered for promotion as and when it arises in accordance with the Rules, but there is no fundamental right for promotion, hence, the gradation list cannot be challenged as it is violative of Articles 14 and 16 of the Constitution of India. In support of this contention, he relied on the decision reported in (Director, Lift Irrigation Corporation Limited and others v. Pravat Kiran Mohanty and others) (1991) 2 Supreme Court Cases 295 wherein in Para No. 4, it was held thus:-

> "4. ....There is no fundamental right to promotion, but an employee has only right to be considered for promotion, when it arises, in accordance with the relevant rules. From this perspective in our view the conclusion of the High Court that the gradation list prepared by the corporation is in violation of the right of the respondent/writ petitioner to equality enshrined under Article 14 read with Article 16 of the Constitution, and the respondent/writ petitioner was unjustly denied of the same is obviously unjustified."

The learned Additional Solicitor General submitted that administrative action is subject to judicial review on the following grounds namely (i) illegal, irrational and procedural impropriety. Unless an administrative action is tainted by any vulnerability such as lack of fairness in procedure and illegality, the Court are slow to interfere. In this context, he relied on the decision reported in Delhi Development Authority v. UEE Electricals Engg. (P) Ltd., (2004) 11 SCC 213 wherein in Para No.11 and 12, it was held thus:

> "11. One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is "illegality", the second "irrationality" and the third "procedural impropriety". These principles were highlighted by Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service (commonly known as CCSU case).
>
> 12. Courts are slow to interfere in matters relating to administrative functions unless decision is tainted by any vulnerability such as lack of fairness in procedure, illegality and irrationality. Whether action falls within any of the categories has to be established. Mere assertion in that regard would not be sufficient."

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It is further submitted by the learned Additional Solicitor General that when there is a presumption that power is exercised in

good faith and for public benefit, the burden of proof of mala fide is on the individual asserting the same. In this context he relied on the decision reported in Union of India v. Ashutosh Kumar Srivastava,(2002) 1 SCC 188 wherein in Para No. 7, it was held thus:-

> "7. ....The Tribunal should not have proceeded on line proving the moral indicated in one of Aesop's Fables of the lamb and the wolf when the complaint was that the stream was being polluted by the lamb and if not by it, by any of its forefathers. The approach of the Tribunal in this regard is by no reason good enough to chastise the said Respondent 2 and condemn the proceedings conducted not only by him but other officers who are of equivalent rank. There is always a presumption in favour of administration that it exercises powers in good faith and for public benefit. The burden is on the individual to produce sufficient material to suggest of the mala fides of the authority concerned and it is not easy to discharge the same."

The learned Additional Solicitor General submitted that the Government has the power to change the Rules relating to service and the Government Servant has no right to challenge the said authority of the State. In support of this contention, he relied on the decision reported in P.U. Joshi and others vs. Accountant General) (2003) 2 Supreme Court Cases 632 wherein in Para No.10, it was held thus:-

> "10. ....Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/ substraction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of service, as may be required from time to time by abolishing the existing cadres/posts and creating new cadres/posts. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a government servant has no right to challenge the authority of the State to amend, alter and bring

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into force new rules relating to even an existing service."

The learned Additional Solicitor General submitted that the petitioner has not impleaded the person who allegedly favoured others and also the person benefited and in the absence of impleadment of the said person, any contention of mala fide action should not be countenanced by the Court as has been reported (Dr.J.N. Banavalikar v. Municipal Corporation of Delhi) 1995 Supp (4) SCC 89 wherein in Para No. 21, it was held thus:-

> 21. ....Further, in the absence of impleadment of the junior doctor who is alleged to have been favoured by the course of action leading to removal of the appellant and the person who had allegedly passed mala fide order in order to favour such junior doctor, any contention of mala fide action in fact i.e. 'malice in fact' should not be countenanced by the court. This appeal therefore, fails and is dismissed without any order as to costs."

In so far as WP No. 22354 of 2005 is concerned, it is submitted by the learned Additional Solicitor General that entertaining writ petition questioning the illegality of show cause notice stalling enquiries as proposed and retarding investigative process to find out the actual facts with participation in the absence of parties unless Court is satisfied that the show cause notice was totally non-est in the eye of law for absolute want of jurisdiction of the authority to even investigate into the facts, writ petition should not be entertained for mere asking and as a matter of routine. In support of this argument, the learned Additional Solicitor General relied on the decision reported in (Special Director and another vs. Mohd. Ghulam Ghouse and another) (2004) 3 Supreme Court Cases 440 wherein in Para No.5, it was held thus:-

> 5. This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show-cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless the High Court is satisfied that the show-cause notice was totally non est in the eye of the law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show-cause notice and take all stands highlighted in the writ petition. Whether the show-cause notice was founded on any legal premises, is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could

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approach the court. Further, when the court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is not accorded to the writ petitioner even at the threshold by the interim protection granted."

5. The petitioner is a Commandant in the Indian Coast Guard. The hierarchy, classification and ranks of the officers and other members of the Coast Guard are as under:-

i) Director General
ii) Inspector General
iii) Deputy InspectorGeneral
iv) Commandant
v) Deputy Commandant and
vi) Assistant Commandant

6. In Coast Guard (General) Rules, 1986, the above said ranks are found mentioned. The Coast Guard (Seniority and Promotion) Rules, 1986, hereinafter referred to as Rules, speaks about how the promotions to be made. Rule 7 of the said Rules contemplates that officers shall be eligible for promotion (i) against vacancies occurring in the respective branches to which they belong (ii) the promotion of officers to the rank of Deputy Inspector General shall be made on the basis of the seniority subject to fitness (iii) the promotion of officers to the rank of Commandant and above shall be made on the basis of merit with due regard to seniority (iv) the promotion of officer to the rank of commandant and above shall be on acting basis and they will be confirmed from the date of their promotion on rendering satisfactory service for a period of one year in the higher rank and the services shall be assessed on the Annual Confidential Report rendered on the officers. The said Rule 7(3) was in force till amendment was made on 17th September 2004.

7. In the case on hand, the Departmental Promotion Committee (DPC) considered the promotions for the year 2003 and 2005. It is not in dispute that the 2003 DPC was governed by Rule 7 (3) of Pre-amended Rules so far as the rank of commandant and above are concerned. The 2005 DPC is governed by Amended Rule, which came into force on 17th September 2004.

8. It is evident from the said Rule that the promotions of the officer to the rank of Deputy Inspector General shall be made on the basis of their seniority subject to fitness. In so far as promotion of officers to the rank of Commandant and above shall be made on the basis of merit with due regard to seniority. The Case of the petitioner is that when his name was considered in the 2003 DPC, though he has secured higher marks, he was not included in the selection list, but only the respondents 3 to 6 in WP No. 30240 of 2003 were included. Though the 7th respondent in WP No. 30240 of

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2003 is arrayed as a party, he was not promoted, which is admitted by both sides, hence, he is not a necessary party at all. The reasons for non-inclusion of the petitioner in the selection list was mentioned in the counter filed by the respondents/department in Para No.4 and 6. In para No.4, it is stated that the officer to be promoted to the post of Deputy Inspector General must be in medical category S1A1, S2A1 or S2A2 on the date of promotion following Rule 14. It is further mentioned in the said paragraph of the counter that the petitioner was in low medical category i.e., S3A2 on the relevant date as such he was not entitled to promotion to the rank of Deputy Inspector General in the normal course, though he satisfied other requirements namely more than 8 years of service in the rank of commandant and 2 years sea-time. In Para-6 of the said counter, it is stated that the petitioner who was in Serial No.9 of the nominal roll of commandant (GD) was duly considered and he was found eligible and within the laid down zone of consideration, however 4 commandants (GD) who are senior to the petitioner were found fit for promotion and in the promotable category were recommended by promotion board.

9. It is the grievance of the petitioner that the respondents/department have not given any details in the counter as to what is the criteria followed, hence, this Court called for the records and the original records relating to the said subject was produced before this Court by Mr. V.T. Gopalan, learned Additional Solicitor General. It is seen from the records that in Appendix B, last five years Annual confidential report of 12 persons is found mentioned and the respondents 3 to 6 in WP No. 30240 of 2003 are admittedly senior than the petitioner. One S. Sonak is also senior than the petitioner. One Krishnamoorthy was junior to the petitioner. The petitioner and the said Krishnamoorthy have secured 13.76 and 14.42 respectively. One S.C. Tyagi, who is senior than the petitioner has secured 13.74. Comparing the said marks, the learned Senior Counsel appearing for the petitioner argued that merit with due regard to seniority was the Rule then in force and the respondents/ department ought to have promoted the petitioner since he has secured 13.76 and ought not to have promoted the said S.C. Tyagi, who has secured only 13.74, 0.02 less than the petitioner.

10. It is replied by the learned Additional Solicitor General that the benchmark given were graded into two categories namely the benchmark 13.50 to 14.99 is 'very good' and 15.00 and above is 'outstanding'. Persons who have secured below 13.50 are not eligible for consideration. Pointing out that the grades were categorised into two as mentioned above, the learned Additional Solicitor General submitted that the respondents 3 to 6 in WP No. 30240 of 2003 have secured benchmark of 13.50 to 14.99, considring the same in due regard to their seniority, they were selected. It is further demonstrated by learned Additional Solicitor General that though the petitioner has secured 13.76 and one Krishnamoorthy, junior to the petitioner has secured 14.42 and both found fit, they were not selected on the ground that they are not seniors than the respondents 3 to 6 in WP No. 30240 of 2003.

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11. Mr. G. Rajagopalan, learned Senior counsel appearing for the petitioner relied on the decision reported in (Sarat Kumar Dash and others vs. Biswajit Patnaik and others) 1995 Supp (1) Supreme Court Cases 434 mentioned supra and submitted that in the case of merit with due regard to seniority, the assessment of comparative merit of all eligible candidates and selecting the best out of them has to be made, then, the seniority has no role to play. The petitioner, having secured the highest mark, he should have been preferred than the 6th respondent, but the 6th respondent was selected on the ground that he is senior than the petitioner, which is contrary to the then Rule. The Coast Guard Service is following numerical grading system. The Government has fixed sum of promotion potential and promotion quotient equivalent to 13.50 to 14.99 as 'very good'. Keeping in view of the benchmark assessment, the eligible officers in the zone of consideration were considered fit or unfit for further promotion. The selective list is thereafter drawn from amongst those considered for promotion in the order of their inter-se seniority.

12. It is seen from the records that one Krishnamoorthy, who is senior to the petitioner has secured more marks than the petitioner as well as the respondents 3 to 6 in WP No.30240 of 2003 and he was found fit, but not selected. Similarly, the petitioner has secured higher marks than the 6th respondent and though he was found fit, he was not selected on the ground that he is not senior than the respondents 3 to 6.

13. The records placed shows that select list was drawn in order of their inter-se seniority only. The grading is decided by taking the average of marks awarded for five years, two grading categories were adopted namely 'very good' (13.50 to 14.99) and 'outstanding' (15.00 and above). The respondents 3 to 6 have come into the grading of 'very good' and taking into consideration that they were seniors and accommodated in the existing four vacancies. The files produced before this Court by the respondents/ department shows that they have followed the grading given by the Government, evolved criteria for giving marks on the basis of the said grading, hence, this Court hold that in DPC 2003, the principle merit with due regard to seniority has been correctly applied. In view of the above discussion, this Court is of the view that WP No. 30240 of 2003 is devoid of merits.

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14. It is argued by the learned Senior counsel for the petitioner that in DPC 2005, the respondents/ department have conducted proceedings under the pretext of following amended Rule 7 (3) and the respondents 4 to 8, who were juniors to the petitioner were promoted. The amended Rule 7 (3) says that promotion of officers to the rank of commandant and above shall be made on relative merit based selection within the eligible batch of officers of his cadre and branch to which he belongs and subject to possession of requisite qualification contained in the annexure of the said Rules but the petitioner's name was not considered on mala fide reasons.

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15. It is well settled that the Government has every power to change the Rules relating to service of the Government servant and

in that event the Government servant has no right to challenge the said authority of the State to amend or alter the rule as held by the Honourable Supreme Court reported in P.U. Joshi and others vs. Accountant General) (2003) 2 Supreme Court Cases 632.

16. The Government of India is the largest employer rendering numerous services, technical and otherwise. In order to have more or less a uniform code for promotion and selection and to avoid bias, prejudice and stand scrutiny in Court of law for its justness and fairplay, Rules and orders issued by it. It is stated that the respondents/ department has been following the DOT&P instructions, while conducting promotion boards for promotion to the selective ranks, zone of consideration etc., Following the instructions of DOP&T, benchmark was fixed with reference to last five years confidential reports. In the absence of statutory Rules, the respondents/ department applied DOT&P instructions for grading categories, hence, this Court is of the view that applying DOT&P instructions is valid.

17. It is seen from the records that the petitioner was within the zone of consideration for promotion. As per the revised conditions of service notified vide SRO 133 dated 17.09.2004, the commandant with the following QRs are eligible for consideration for promotion to the rank of DIG based on comparative merit from amongst the officers in the zone of consideration. Consequent to the revision of condition of service, the Government has accorded approval for selection procedure as indicated below:-

i) last five years confidential report in the rank failing which all rank report to be considered

ii) All vacancies in the rank accruing from first of April to 31st of March of next year will be catered for by the respective promotion board to be convened in the first quarter of each year.

(iii) Selection by suitable promotion board based on comparative merit as per assessment recorded in the relevant CRs. All eligible officers in the zone of consideration are to be placed in descending order of merit as per the average numerical assessment of relevant potential reports and to draw a select list rank branch wise depending upon the number of vacancies available in a particular year

(iv) every eligible officers shall be subject to 3 'looks' by respective promotion board. After first look, those not selected shall be assigned R1 status. After second look, they will be assigned R2 status. The promotion board shall consider only fresh look R1 and R2 officers each year

(v) Each promotion board is considered to full batch every year ensuring that a minimum of 2 eligible officers available for each vacancies in the rank of commandants and 3 candidates against every vacancies in the rank of Deputy Inspector General and Inspector General.

(vi) For promotion to a higher rank, eligibility shall be as per the revised conditions of service/residency period.

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The Order of Merit of Commandants of GD Branch as follows:-

"ORDER OF MERIT

COMMANDANTS OF GD BRANCH WITH RANK SENIORITY UPTO APR 1995

S.No	Name	P.No.	2005 -06	2004 -05	2003 -04	2002 -03	2001 -02	AVG
1.	KPS Raghuvanshi	0095-P	15.30	15.00	14.50	14.60	13.90	14.66
2.	K Natarajan	0091-E	14.40	14.40	14.40	14.80	14.50	14.50
3.	VSR Murthy	0092-J	14.60	14.80	14.60	14.40	13.90	14.46
4.	G Singh	0083-M	14.60	14.60	14.50	14.40	1.80	14.38
5.	KS Sheoran	0089-L	14.40	14.20	14.00	14.20	14.00	14.16
6.	VK Sharma	0042-S	14.20	14.20	14.00	13.60	13.80	13.96
7.	PK Luthra	0010-V	14.00	14.20	14.10	14.00	13.30	13.92
8.	RK Wadhwa	0041-Q	14.40	14.20	13.70	12.90	13.90	13.82
9.	AS Rathore	0088-X	14.20	14.10	14.00	13.60	13.10	13.80
10.	A Athinarayan	0093-L	13.90	14.00	13.50	14.00	13.60	13.80
11.	S Srikumar	0043-V	14.40	13.80	13.20	13.80	13.70	13.78
12.	SK Singh	0069-E	14.20	14.00	13.30	12.70	13.10	13.46
13.	S Sonak	0061-M	13.60	13.60	13.20	13.00	13.60	13.40
14.	BP Singh	0073-P	13.40	12.60	13.00	13.60	14.00	13.32
15.	SK Chaudhary	0063-Q	14.00	13.00	10.80	12.70	13.10	12.72
16.	LS Asai	0024-D	13.30	12.60	12.00	11.30	11.50	12.14"

Thus, promotions have been made on relative merit based selection, hence, the respondents 4 to 8 in WP No. 36065 of 2005, though juniors to the petitioner, were rightly selected for promotion to the post of DIG, hence, the averments of the petitioner in WP No. 36065 of 2005 that his juniors were slected, ignoring seniority and merit of the petitioner is not considered deserves no consideration.

18. While considering challenge to administrative decision, the Courts will not interfere as if they are sitting in appeal over the decision. The administrative action is subject to judicial review on the following grounds namely the procedure adopted is illegal, irrational or impropriety. The discussion made above makes it clear that there is no lack of fairness in the procedure adopted by the respondents/department or there is any illegality, in such case, interference of this Court is not warranted as held by the Honourable Supreme Court in the decision reported in (Delhi Development Authority v. UEE Electricals Engg. (P) Ltd.,) (2004) 11 SCC 213 mentioned supra. The Honourable Supremme Court in (Union of India vs. Ganayutham) 1997 (7) SCC 463 held that in essence the test is to see whether there is any infirmity in the decision making process and not in the decision itself.

19. The petitioner was considered for promotion but he was not selected. An employee has a right to be considered for promotion as and when it arises in accordance with Rules, but there is no fundamental right for promotion as held by the Honourable Supreme Court in the decision rendered in (Director, Lift Irrigation Corporation Limited and others v. Pravat Kiran Mohanty and others) (1991) 2 Supreme Court Cases 295 cited supra.

20. The averments made by the petitiner that there were 12 to 15 vacancies in the year 2003 when DPC was convened, which was vehemently disputed by the respondents/department. The respondents / department furnished the details of the then existing vacancies and

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how those vacancies arose, but no record has been placed by the petitioner to show that there were more than 4 vacancies. In view of the same, this Court has no other alternative except to reject the said averment of the petitioner.

21. The learned Senior counsel for the petitioner submitted that the petitioner filed WP No. 30240 of 20093 challenging the selection by DPC in the year 2003. When the said writ petition is pending, the respondents/ department have sent a communication dated 13.11.2003 threatening departmental action since the petitioner has filed writ petition before this Court, which was also brought to the notice of this Court and this Court directed the respondents/department to tender an unconditional apology, which was complied with by them. This Court also directed the respondents to consider the petitioner for promotion in the forthcoming DPC. In the meantime, the respondents/department issued another show cause notice dated 08.06.2005 to the petitioner and other members stating that when the petitioner was sitting along with other members to hear a case, though ample documentary evidence were brought on records to establish the charges relating to the said accused, the same were not considered properly, which amounts to failing in the duty and called for an explanation from him, which was challenged in WP No. 22354 of 2005. At that time, the DPC for 2005 was convened by the respondents/department, but the petitioner was not selected for the obvious reasons that he approached this Court, hence, it is stated that the respondents/department acted malafide. It was denied by the respondents/department as false and stated that even for such allegation, it is necessary to name the officer and prove by positive evidence. Of course, it is not necessary to name the officer who is allegedly responsible for misusing the authority as held by the Honurable Supreme Court in the decision reported in (The State of Punjab vs. Ramji Lal and others) AIR 1971 Supreme Court 1228 stated supra. On careful consideration of the submission of counsel for both sides and also perusal of the material records, this Court is of the view that no malafide is found. The argument of the learned Senior counsel for the petitioner in that aspect also rejected.

22. In WP No. 22354 of 2005, the petitioner has challenged the show cause notice dated 08.06.2005. Similar notice was issued to the other members who sat with the petitioner to hear the said particular case. The petitioner has averred that the said show cause notice is without jurisdiction. In the said writ petition, no interim order was granted by this Court till date and it is not explained by the respondents/ department as to whether any action has been initiated against the petitioner pursuant to the said notice. The Honourable Supreme Court in the decision reported in (Special Director and another vs. Mohd. Ghulam Ghouse and another) (2004) 3 Supreme Court Cases 440 cited supra held that whether the show-cause notice was founded on any legal premises is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the court. Following the samme, the petitioner is directed to submit his objection to the respondents/department and on receipt of the same, the authorities are directed to consider it as a

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preliminary issue. WP No. 22354 of 2005 is ordered accordingly.

23. In the result, WP No. 30240 of 2003 and 36065 of 2005 are dismissed. No costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

rsh

To

1. The Secretary to Government of india,
Union of India
Ministry of Defence
South Block
New Delhi - 110 001

2. The Director General
Coast Guard
Coast Guard Head Quarters
National Stadium Complex
New Delhi - 110 009

3. The Commander
Coast Guard Region (East)
Near Nappiar Bridge
Koovam River Mouth
Chennai - 600 009

1 cc to Mr.P. Wilson, Assistant Solicitor General, Sr. 44655
3 ccs to M/s. G.R. Associates, Advocate, Sr. 44594 to 44596

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